THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

JUDGMENT

Case number: 092/08
No precedential significance

In the matter between:

RMR COMMODITY ENTERPRISE CC t/a KRASS BLANKETS	**APPELLANT**
and	
THE CHAIRMAN OF THE BID ADJUDICATION COMMITTEE	**FIRST RESPONDENT**
AFRICHOICE TENDERS CC	**SECOND RESPONDENT**
THE MINISTER OF FINANCE	**THIRD RESPONDENT**
THE MINISTER OF CORRECTIONAL SERVICES	**FOURTH RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY	**FIFTH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**SIXTH RESPONDENT**

Neutral citation: ***RMR Commodity Enterprise v The Chairman: Bid Adjudication Committee*** **(092/08) [2009] ZASCA 2 (20 February 2009)**

CORAM: **Harms DP, Brand *et* Lewis JJA**
HEARD: **20 February 2009**
DELIVERED: **20 February 2009**
CORRECTED:
SUMMARY: Review of tender award – contract period of tender lapsed prior to hearing of appeal – no substantial points of law or matters of substance raised – appeal dismissed by reason of mootness under s 21 A(1) and (3) of the Supreme Court Act 59 of 1959.

ORDER

On appeal from: High Court, Durban
(Hugo J sitting as court of first instance)

1. The appeal dismissed with costs, including the costs of two counsel where employed.

Harms DP, Lewis JA concurred.

JUDGMENT

BRAND JA

[1] During October 2006 the National Treasury invited tenders for the supply of over 183 000 blankets to the Department of Correctional Services and the South African Police Service. Among those who submitted tenders were the appellant ('RMR') and the second respondent, Africhoice Tenders CC ('Africhoice'). The tenders were submitted to a bid evaluation committee ('the Evaluation Committee') which was obliged to make recommendations to a committee under the chairmanship of the first respondent ('the Adjudication Committee') on the award of the tender. Both these committees were established under the auspices of the National Treasury, pursuant to the provisions of the Public Finance Management Act 1 of 1999 and the regulations promulgated under that Act.

[2] RMR tendered R108.30 per blanket, which was R3.65 per blanket less than the price tendered by Africhoice. Moreover, RMR's bid also obtained the highest number of preference points for equity ownership by historically disadvantaged individuals, as envisaged by the provisions of the Preferential Procurement Policy Framework Act 5 of 2000. In accordance with s 2(1)(f) of the Act, clause 2.1(b) of the tender invitation provided that:

'a contract may, on reasonable and justifiable grounds, be awarded to a bid that did not score the highest number of points.'

Relying on this exception to the rule, the Evaluation Committee recommended that the contract be awarded to Africhoice and not to RMR. The Adjudication Committee decided to endorse this recommendation. On 12 July 2007 the National Treasury thus published on its website that the contract had been awarded to Africhoice. This was relatively short notice, since the contract period was destined to commence on 1 August 2007 and to endure until 31 March 2008.

[3] When RMR heard of these developments, it launched an urgent application in the Durban High Court against the first two respondents as well as the various Government Departments involved. The main relief sought in the application was for an order that the Adjudication Committee's decision to award the tender to Africhoice be reviewed and set aside. As an adjunct to the main relief, RMR sought an interim interdict to the effect that, pending the finalisation of the review application, the Department of Correctional Services and the South African Police Service be restrained from placing any orders for blankets under the contract with Africhoice. In motivating the application for the interim interdict, RMR pointed out that the contract period was due to terminate on 30 March 2008 and that the setting aside of the award after that date would be of no consequence.

[4] On 17 August 2007 Rowan AJ granted the interim interdict sought, pending the outcome of the review application, which he scheduled to be heard by himself on 2 October 2007. As it happened, however, and for reasons no longer relevant, the matter was heard in November 2007 by Hugo J who dismissed the review application with costs. This, of course, also spelt the end of the interim interdict. The appeal against that order is with the leave of the court a quo.

[5] Only four of the respondents opposed the appeal. The others abided the decision of this court. The first, third and fourth respondents, on the one hand, and the second respondent, on the other, were represented by different

counsel. Yet, they all raised the preliminary issue that the appeal is moot in that its outcome will have no practical impact on the parties, or, for that matter, on anyone else.

[6] The factual basis for the argument is, of course, that the period of the contract awarded to Africhoice terminated on 31 March 2008. As rightly pointed out by the respondents, the relief claimed by the appellant in the court a quo was that the award of the contract to Africhoice to be set aside and that it be awarded to the appellant. But since the contract period has come and gone, so the respondents argued, an award of that contract would be of no use to the appellant or anybody else.

[7] The legal basis for the respondents' argument is to be found in s 21 A(1) and (3) of the Supreme Court Act 59 of 1959. It provides:

'(1) When at the hearing of any civil appeal to the [Supreme Court of Appeal] or any Provincial or Local Division of the [High] Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

. . .

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

[8] RMR's first answer was that a judgment in this appeal would indeed have a practical effect. In motivating this answer RMR referred to its unsuccessful tenders for the supply of blankets to the State in three preceding years and its pending litigation with the National Treasury arising out of these unsuccessful tenders. In this light, so RMR contended, a definitive decision by this court on the matters in issue, would serve to properly inform and guide the Bid Adjudication Committee and the officials of the National Treasury in their handling of the appellant's future tenders, and thus avoid even further litigation in years to come.

[9] The problem I have with this argument is that although it sounds correct in the abstract, it is devoid of any factual foundation. The issues in the appeal are inextricably bound to the review grounds relied upon by the appellant. Most prominent amongst these is an alleged failure by the Adjudication Committee to comply with the *audi alteram partem* principle ('the *audi* principle'). However, as has been pointed out time and again by this court and others, there is no single set of principles for giving effect to the rules of natural justice, including the *audi* principle, which will apply to all investigations, enquiries and other exercises of administrative power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a wide variety of different situations. In short, the question whether or not the requirements of the *audi* principle had been complied with in this case, is therefore entirely dependent on the facts.

[10] A further ground of review relied upon by RMR is that the Adjudication Committee erred when it decided that a letter by the Department of Trade and Industry included in the appellant's tender in compliance with clause 13 of the tender conditions, did not in fact constitute compliance with this clause. Broadly stated, RMR's contention is that this decision by the Adjudication Committee resulted from a wrong interpretation of either clause 13 or the contents of the DTI letter or both. It is unnecessary to analyse the argument in any detail. What strikes me as relevant for present purposes is that both the clause and the letter are peculiar to this tender. What is more, the clause and the letter stand to be interpreted against the background of the facts and the dispute in this case which will most probably be different from the next case.

[11] RMR's further ground of review relies on the allegation that the Adjudication Committee should not have considered the tender by Africhoice, because it did not comply with the tender conditions. But, as was pointed out in *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) para 15, there are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be

said to have been compliance with the specifications and conditions of a tender, must necessarily depend on the facts of that case.

[12] As its final review ground RMR relied on what it contended to be a reasonable suspicion that the Adjudication Committee was biased against it. In support of this contention it relied on the way in which the Adjudication Committee conducted itself during both the tender proceedings and the litigation that followed. From the very nature of the argument it is therefore clear that a decision on this issue will again be inextricably bound to the facts of this case. In the result there is, in my view, neither any matter of law or general principle, nor any matter of great public importance that compels this court to embark upon determination of a dispute that has become of academic interest only.

[13] An alternative argument raised by RMR was that, even if the issues on the merits were held to be moot, they should be decided in order to determine the question of costs. Support for this argument was sought in the judgment of this court in *Chairperson, Standing Tender Committee v J F E Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA). But in my view that was not a case where this court decided academic disputes in order to determine the question of costs. On the contrary, what was held in that case was that although the decisions of the administrative authority were fatally flawed (paras 15 and 19) and although the setting aside of those decisions would have practical consequences (para 24), the practical consequences were so untenable (para 27) that the court should, in the exercise of its discretion, allow the invalid administrative decisions to stand (paras 28 and 29). But, in the circumstances, so the court held, there was no reason why the administrative authority should not bear the costs of litigation. In a sense, the situation in *J F E Sapela* was therefore the converse of what happened in this case, where the setting aside of the administrative decision would have no practical consequences and where the only outstanding issues relate to costs.

[14] Lastly, RMR sought to demonstrate on the record that whereas it had done everything in its power to obtain a final decision in the court a quo, the

respondents' conduct was patently calculated to cause delay, and that for that reason it was entitled to costs. I find it unnecessary to enter into this debate. Even if the appellant were right, I believe that these considerations would, in any event, be insufficient to constitute 'exceptional circumstances' as contemplated by sub-section 21 A(3) so as to warrant the entertainment of the appeal with the sole purpose of determining issues of costs.

[15] For these reasons the appeal is dismissed with costs, including the costs of two counsel where employed.

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F D J BRAND
JUDGE OF APPEAL

Concur:

HARMS DP
LEWIS JA